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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Jacqueline Weaver, Substitute Administrator of
The Estate of EvaMae H. Hearn, Deceased,

Petitioner,

v.

Michael A. Hinshaw, M.D., General Surgeons, Inc.
and Reid Hospital & Health Care Services,

Respondents.

On Petition For Writ of Certiorari
To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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19 pp

A. Question Presented For Review

Whether the equal protection and due process rights of Petitioner, an African-American, and Ellen Mabry, the only available African-American venire person, were violated when the trial judge removed Ms. Mabry from the preassigned numerical queue and replaced her with a Caucasian juror, because she was late for jury duty, arriving during the trial court's general *voir dire* examination, but prior to the parties' *voir dire* examination.

B. Parties To the Proceeding in the Court Whose Judgment is Sought to be Reviewed:

Jacqueline Weaver, Substitute Administrator of the Estate of EvaMae Helouise Hearn, Deceased

Michael A. Hinshaw, M.D.

General Surgeons, Inc.

Reid Hospital & Health Care Services, Inc.

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E. Concise Statement of the Basis For Jurisdiction in the United States Supreme Court.

(I) Date the Judgment or Order Sought To Be Reviewed Was Entered

July 11, 2002	Order of the Indiana Supreme Court Denying Appellant's Petition To Transfer of Jurisdiction.

(ii) Date of Any Order Respecting Rehearing, or Extension of Time to File the Petition For A Writ of Certiorari:

Not Applicable.

(iii) Cross-Petition for a writ of Certiorari: Not applicable.

(iv) Statutory Provision Believed to Confer on this Court Jurisdiction to Review on a Writ of Certiorari the Judgment or Order in Question:

28 U.S.C. Sect. 1257.

Supreme Court Rule 10: The Indiana Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. The Indiana Court of Appeals has decided an important question of federal law that conflicts with relevant decisions of this Court.

(v) Rule 29.4 notifications: Not Applicable.

F. Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved in the Case:

Sixth Amendment to the Constitution of the United States. Appendix p. 55.

Fourteenth Amendment to the Constitution of the United States of America Appendix p. 55.

G. Concise Statement of the Case Setting Out the Facts Material to Consideration of the Questions Presented:

(I) Review of State Court Judgment

This is a medical malpractice wrongful death case originally brought by Robert Daniel Hearn, Administrator of the Estate of his wife, EvaMae Helouise Hearn, Deceased, in the Wayne County, Indiana, Superior Court 1. Jacqueline Weaver, the Decedent's only child, was substituted as Administratrix upon the death of Robert Daniel Hearn during the pendency of this appeal in Indiana. Petitioner and his wife were African-American. Persons summoned for jury duty were assembled in the courtroom and asked whether there were any hardship or other grounds that would prevent service as a juror. An African-American woman approached the bench and indicated that she was responsible for the care of her invalid mother and that she needed to be excused. She was excused. This event does not appear in the record. After excusing jurors due to hardship, the trial court commenced general *voir dire* questioning of the remaining persons who had been summoned for jury duty, all of whom were Caucasian.

At a point into the trial court's general *voir dire* of potential venire persons, (time involved is disputed by the parties) Ellen Rochelle Mabry, an African-American woman who had been summoned for jury duty, entered the courtroom and sat in the back of the room. The trial judge observed her arrival, but ignored her and continued asking general *voir dire* questions of the Caucasians who had been summoned for jury duty for an additional period of

time, when the bailiff interrupted and advised him that Ms. Mabry was present. The following is from the record of the proceedings commencing at the point when the bailiff interrupted the court's *voir dire*:

COURT BAILIFF:	Judge?
THE COURT:	Um?
COURT BAILIFF:	Ellen Mabrey (sic) is here.
COURT:	Okay.
COURT BAILIFF:	She hasn't been sworn yet.
THE COURT:	Is she still outside you say?
COURT BAILIFF:	No. (inaudible).
COURT BAILIFF:	Juror 395.
THE COURT:	And at what point did Miss Mabrey come in?
COURT BAILIFF:	She just came in a few minutes ago.
THE COURT:	I take it, ma'am, you've not been here for all my questions then.
JUROR MABREY:	(inaudible).
THE COURT:	Okay. Let me ask you if you could just sort of stand by for us and if you're

needed, why, we'll get to you, if not, maybe then you won't have to serve.

(Voir dire continues)

MS. NEISWINGER: Judge, may we approach the bench. (Unintelligible) Mabrey she was supposed to - she came ahead of Criscinda Elsrod. She's still not coming in.

THE COURT: That's the thing we need to make a bench conference or a bench comment on after we get the jury selected.

MS. NEISWINGER: Well, is she eliminated? Ms. Mabrey?

THE COURT: She was moved to the last – I told her that when she left the courtroom.

MS. NEISWINGER: She was what?

THE COURT: I excused - she was moved to the end of the panel. I've excused everything - everybody from the first eight on, which included

her, so - in other words, I indicated to you I was not willing to bring her in and go through everything we had to go through with all the other jurors so that she would be a part of the panel.

MS. NEISWINGER: (Unintelligible).

THE COURT: I know. We will.

(voir dire continues.)

THE COURT: Okay. I think, so we don't forget it, at 2:15, there was a bench conference at which plaintiff's counsel asked about Miss Mabrey. I've got to find her number here.

MS. NEISWINGER: She's number 395.

THE COURT: Okay. The question was why Ms. Elsrod was put into the jury box to replace, I think, it was Mr. Steele, who, at that time was excused and not Ms. Mabrey. Ms. Mabrey was not here when we started

voir dire examination, was not sworn with the other jurors and a portion, at least, of the Court's voir dire examination had already occurred at the time she entered the courtroom. Then, it was sometime before I was told who she was. I saw an individual enter, but I really didn't know who that person was. So when I was asked do we replace juror Steele with juror Elsrod (sic, should read "Mabry"), my response was no. To do that we would have had to stop all proceedings, go back, deal with juror Elsrod (sic) individually to get her up to the point where all the other jurors were in order to accomplish that. Since we're dealing with this many people's lives in selecting a jury, I elected not to do that. So, not whether you agree with my decision there or not, but is that a fair statement of what occurred during the bench conference?

MS. NEISWINGER: We agree - we agree that

Ms. Mabrey was over - was passed over, but she was not dismissed from these proceedings. Our objection is on the grounds that Ms. Mabrey is an African-American, my client is an African-American and the equal protection and due process clauses of the United States Constitution give him the right to have a jury that is fairly selected and to the maximum extent possible, representative of the community. She was present, we didn't believe that she missed much of the Court's voir dire that she could be brought up to speed rather quickly. She was passed over both in terms of replacing Mr. Steele, who was the employee of one of the defendants here, and also was passed up for the purposes of sitting as an alternate juror. And it is our contention that it would not have taken that much time to have asked her the voir dire questions and she only missed approximately, we - in my

estimation ten minutes or so of what the Court's questions were.

THE COURT: I totally disagree with that time estimate, but that's up to you, I guess.

MS. NEISWINGER: Well, but what the result is is that the jury, both in terms of the jurors and alternates, are now all white and this was an opportunity, at least, for us to have an opportunity to have an African-American juror on this jury, and for that reason, we objected at the time when Ms. Elsrod replaced Brian Steele. Ms. Elsrod was juror number 396. She replaced juror number 384. The next person in the queue and as I understand in our preparation for this trial was that the jurors were to be taken in the order in which their juror questionnaires are numbered and she was excluded from that list and we don't believe that the grounds comply with the Constitution's requirements

for his equal protection and due process rights and on that ground we objected, and we did object promptly when Ms. Elsrod was seated and also at the time when the alternate jurors were brought in and we believe that - that he was entitled to at least have the opportunity to have a representative of his own race sit on the jury or at least as an alternate.

THE COURT: I'll ask the defendants, was my statement a fair statement of the bench conference that occurred here?

MS. WATTS: Yes, Your Honor.

MR. WHALEY: The only - the only thing that I noticed, Your Honor, is that I think you used Ms. Elsrod's name once when you meant Ms. Mabrey's name.

MS. NEISWINGER: No, he said Ms. Elsrod is the one he put in place of Mister - Mr. Steele, that's what he said.

MR. WHALEY: Well, I think he said that at first and I just thought that the names got messed up later, but maybe I'm wrong.

THE COURT: Okay. I - it was Ms. Mabrey who came in late.

MR. WHALEY: Right.

THE COURT: Was not sworn and Ms. Neiswinger's right, I indicated that she should go out with the other jurors who were outside the courtroom. If we needed her services at the end, we would call upon her, otherwise we went ahead and I used Ms. Elsrod to replace Mr. Steele and that's - those are the names involved.

MR. SHUBAT: Judge, I would just like to put on the record that my - I wrote down that you started questioning the jurors at 1:20 and based upon her statement that she was here for 20 minutes or so, that means that she would have had to miss about 35 minutes rather than the ten at least

by my estimation.

THE COURT: Okay.

MS. NEISWINGER: To be honest, I wasn't watching the clock either time, but it didn't seem to be like she missed a massive amount of what had gone forward and I - we believe that she could have been given the oath and brought up to speed rather quickly considering that it's an important constitutional right and one that has been recognized by the United States Constitution - or the United States Supreme Court. And since it is a fundamental right, we felt that it was important to at least the opportunity be presented.

THE COURT: Anything further?

MS. NEISWINGER: I don't think so. Clyde, do you have anything further?

THE COURT: Yes or no?

MS. NEISWINGER: No, your Honor. I think we've already stated our objections. We did - I don't

think there is a dispute though, in case it should come to this later on, that we did make a timely objection at the time that Ms. Elsrod replaced Mr. Steele.

THE COURT: Your objection was at 2:15. I noted the clock and that's when we had the bench conference.

MS. NEISWINGER: Plus we also approached the bench at the time that the panel of potential alternates was brought in as well.

THE COURT: That's true.

MS. NEISWINGER: So we objected on both occasions.

THE COURT: Okay. All right. Can we go on then?

MS. NEISWINGER: Yes.

(End of hearing as it relates to Juror Mabrey).Transcript, pp. 29-34.

The all-Caucasian jury returned a verdict in favor of the Defendants in all respects on December 18, 2000, which was reduced to Judgment.

(Appendix, pp. 1-10). In the "Order Regarding Trial by Jury and Judgment," *Id*, the trial court judge stated the following: "The Court estimated that it had questioned prospective jurors for approximately 35 minutes at the time Ms. Mabry **entered** the courtroom" (Appendix, p.2, emphasis added). However, based upon the transcript, Petitioner contends that while Ms. Mabry may have *missed 35 minutes* of the court's general *voir dire*, she was not 35 minutes late in appearing for jury duty:

MR. SHUBAT:	Judge, I would just like to put on the record that my - I wrote down that you started questioning the jurors at 1:20 and based upon her statement that she was here for 20 minutes or so, that means that she would have had to miss about 35 minutes rather than the ten at least by my estimation.
THE COURT:	Okay.

Transcript p. 33, lines 20-26.

The foregoing exchange from the transcript indicates that Ms. Mabry may have been approximately 15 minutes late in arriving, and sat in the back of the courtroom for about 20 minutes more until the Bailiff interrupted the proceedings

While the parties dispute exactly how late Ms.

Mabry was, there is no dispute that the *voir dire* which she missed was a portion of the trial court's general *voir dire*. There is no dispute that the parties had not yet commenced their *voir dire* questioning of the venire panel when the above exchange occurred.

Petitioner filed a timely motion to correct errors on December 22, 2000, (Appendix, pp. 22-33) in which Petitioner argued that the removal of Ms. Mabry from consideration as a juror violated Petitioner's equal protection rights.(Appendix, pp. 30-31). The trial court denied Petitioner's motion to correct errors on January 11, 2001, without specifically addressing the merits of the issues raised. (Appendix, pp. 33-35). Petitioner filed notices of Appeal on February 9, and February 10, 2001.FN 1

Petitioner's brief and appendix were filed before the Indiana Court of Appeals on June 11, 2001. (Relevant excerpt, Appendix pp. 41-49). In Petitioner's brief, he argued that the trial court's exclusion of Ellen Mabry violated his Sixth and Fourteenth Amendment rights to equal protection and due process. (Appendix, pp. 42-49). The Indiana Court of Appeals issued a memorandum decision, not for publication, affirming the trial court in all respects on December 31, 2001. (Appendix, pp. 10-22).

FN 1 (Appendix, pp. 35-41). Note–this case was tried before the regular Judge of the Henry County, Indiana Circuit Court, sitting as Special Judge for Wayne County, Indiana Superior Court 1; in the interests of expediency, and by agreement, papers for this cause were filed in Henry County, under a Henry County cause number; however, the case was actually tried in Wayne County, Indiana; because of this two separate notices of appeal were filed in Henry and Wayne counties.

In the memorandum decision, the Indiana Court of Appeals repeated the trial judge's statement in the Order Regarding Trial by Jury and Judgment (Appendix, p. 2) that Ellen Mabry was 35 minutes late in appearing for jury duty, and stated that Petitioner's claim that she was 15 minutes late in arriving was an invitation to re-weigh the evidence, which it declined to do. (Appendix, p. 18, footnote 3; Memorandum Opinion, pp. 7-8, footnote 3). The Memorandum Opinion also stated, however, that "a determination of the exact amount of time that the juror was late is not essential to our determination of this issue..." (Appendix, p. 18; Memorandum Opinion, p. 8, footnote 3).

In support of its ruling, the Indiana Court of Appeals stated that a trial judge has a duty to conduct business expeditiously and consistent with the orderly procedure and administration of justice. (Appendix, p. 18; Memorandum Opinion, p. 7). The Indiana Court of Appeals held that the standard of review for a trial court's decisions regarding the orderly conduct of a trial was abuse of discretion. (Appendix, p. 18; Memorandum Opinion, p. 7). The court then discussed the Fourteenth Amendment right to equal protection, and stated that Petitioner had the burden to prove the existence of purposeful discrimination, citing *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). (Appendix, pp. 19-20; Memorandum Opinion, pp. 8-9).

The court then proceeded to discuss Indiana case law which set forth the requirements for a *prima facie* case of racial discrimination in the process of jury selection, citing the Indiana case of *McCants v.*

State, 686 N.E.2d 1281 (Ind., 1997), in which the following must be established [following *Batson*]: (1) the excused juror is a member of a cognizable racial group; (2) the prosecutor has exercised peremptory challenges to remove that group's members from the jury; and (3) the facts and circumstances of the case raise an inference that the exclusion was based on race. (Appendix, p. 20; Memorandum Opinion, p. 9).

The court then stated that once a *prima facie* case is established, the burden shifts to the State to provide a race-neutral explanation for the challenge, and that "[i]f the explanation, on its face, is based on something other than race, the explanation will be deemed race-neutral." citing *McCants*, *supra*; (Appendix, p. 20, Memorandum Opinion, p. 9).

Applying this analysis, the Indiana Court of Appeals held that "...the Estate fails to demonstrate that the facts and circumstances of the case raise an inference that the placement of Mabry at the end of the venire panel was based on race. Rather, the trial court's placement of Mabry at the end of the venire panel was based upon her late arrival and the desire to conduct voir dire in an expeditious and orderly manner." (Appendix, pp. 20-21; Memorandum Opinion, p. 9).

Next, the court noted that under the recent Indiana Supreme Court case of *Ashabraner v. Bowers*, 753 N.E.2d 662 (Ind., 2001), a prima facie case of racial discrimination is established when a party removes the only African-American member of the venire. The court then stated it could not determine whether *Ashabraner* was applicable, because the

record does not state why the first African-American woman was dismissed prior to *voir dire*, an issue raised by Defendant, Reid Hospital, which argued that Ms Mabry was not the only potential African-American juror. (Appendix, p. 19, footnote 4; also p. 21; Memorandum Opinion, p.8, footnote 4, also, p. 10).

Nevertheless, the court stated that even if, arguendo, a prima facie case of racial discrimination had been established, the trial court's race-neutral explanation for bumping Ms. Mabry was sufficient, and therefore, the trial court did not abuse its discretion. (Appendix, pp. 21-22; Memorandum Opinion, pp. 10-11).

Petitioner filed a petition for rehearing on January 30, 2001, again raising equal protection and due process arguments, arguing that the mere quest for the orderly, expeditious conduct of a trial should be an insufficient ground to overcome the inference of racial discrimination, and that it was an abuse of discretion to deny Petitioner the opportunity to have a juror of his race serve on the jury just because she arrived late for jury duty. (Appendix, pp. 57-61). The Petition For Rehearing was denied by the Indiana Court of Appeals on February 27, 2002, without analysis. Petitioner filed his petition for transfer to the Indiana Supreme Court on April 1, 2002, (Appendix, pp. 61-65), reiterating his Fourteenth Amendment arguments (Appendix, pp.63-65), which was denied by Order dated July 11, 2002 that did not address the issues raised. (Appendix, pp. 65-66).

H. Argument

The trial court's removal of the only available African American potential juror, on the grounds that she missed a portion of the court's general *voir dire*, was arbitrary and denied the equal protection and due process rights of both Petitioner and the potential juror.

In *Swain v. Alabama*, 380 U.S. 202 (1965), this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Swain, supra*, 380 U.S. at 203-204.

That principle was reaffirmed by this Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed2d 69 (1986), when it held that the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors. *Batson* additionally established that the State unconstitutionally discriminates against the excluded person by denying him or her participation in jury service. *Batson* principles were applied to civil actions as a result of this Court's holding in *Edmonson v. Leesville Concrete Co*, 500 U.S. 614 (1991).

Batson also overruled that portion of *Swain v. Alabama* concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's discriminatory

use of peremptory challenges, and held that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. *Batson*, 476 U.S. at 89-96.

In *Batson*, the prosecutor used peremptory challenges to strike all four of the black persons on the venire, with the result that the jury was composed solely of white persons, who voted to convict Batson. Before the jury was sworn, Batson's counsel moved to strike the panel, arguing that Batson's Sixth Amendment right to a jury drawn from a cross section of the community and Fourteenth Amendment right to equal protection had been violated. Although this case does not involve a party or a prosecutor using peremptory challenges to remove black venire persons, the reasoning and principles of *Batson* are applicable, since it was the actions of the trial judge who removed Ms. Mabry from consideration as a juror. As the following statement from the transcript demonstrates, the trial judge knew that removing Ms. Mabry from the pre-assigned queue would have the effect of eliminating her as a juror:

> I excused - she was moved to the end of the panel. I've excused everything - everybody from the first eight on, which included her, so - in other words, I indicated to you I was not willing to bring her in and go through everything we had to go through with all the other jurors so that she would be a part of the panel.
>
> Transcript, p. 30, lines 8-13

In *Batson*, this Court acknowledged that the Constitution requires the Court to "look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford 'protection against action of the State through its administrative officers in effecting the prohibited discrimination.' *Norris v. Alabama, supra*, at 589; [*19) see *Hernandez v. Texas*, 347 U.S. 475, 478-479 (1954); *Ex parte Virginia, supra*, at 346-347:

> Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, n 10 and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors. N 11 While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice *Hill v. Texas*, 316 U.S. 400, 406 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process,' *Avery v. Georgia*, 345 U.S. 559, 562 (1953); see *McCray v. New York, supra*, at 965, 968 (MARSHALL, J., dissenting from denial of certiorari); see also *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972).
>
> Accordingly, the component of the jury

> selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. *Batson, supra*, 476 U.S., at 88-89

In *Washington v. Davis*, 426 U.S., at 242, this Court noted that "total or seriously disproportionate exclusion of Negroes from jury venires, may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds."

In *Batson*, this Court observed that *prima facie* discrimination was found on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Batson, supra*, 476 U.S., at 95, citing *Whitus v. Georgia, 385 U.S. at 552, Castaneda v. Partida,430 U.S. at 494*, Washington v. Davis, *426 U.S. at 241* , Alexander v. Louisiana, *405 U.S. at 629-631.*

To establish a *prima facie* case of purposeful discrimination in selection of the petit jury, the defendant first must show that he is a member of a cognizable racial group. *Castaneda v. Partida*, 430 U.S. at 494, "..and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those

to discriminate who are of a mind to discriminate.' *Avery v. Georgia*, 345 U.S. at 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination." *Batson, supra*, 476 U.S., at 96.

Applying these principles to the facts of this case, it is clear that the first prong of the *Batson* analysis is met, since Petitioner and Ellen Mabry were both African-American. As to the second and third prongs, Petitioner submits that the trial court's arbitrary removal of the only available black venireperson, "constitute[s] a jury selection practice that permits 'those to discriminate who are of a mind to discriminate", and "raises the necessary inference of purposeful discrimination", *Avery*, 345 U.S. at 562; *Batson*, 476 U.S. at 96, for the reasons explained *infra*.

The trial judge ignored Ellen Mabry when she entered the courtroom, and would in all likelihood have continued ignoring her if the bailiff had not interrupted the proceedings. At the point when she was brought to the judge's attention, it was clear that he had no intention of allowing her to serve:

COURT BAILIFF: Judge?

THE COURT: Um?

COURT BAILIFF: Ellen Mabrey (sic) is here.

COURT: Okay.

COURT BAILIFF: She hasn't been sworn yet.

THE COURT: Is she still outside you say?

COURT BAILIFF: No. (inaudible).

COURT BAILIFF: Juror 395.

THE COURT: And at what point did Miss Mabrey come in?

COURT BAILIFF: She just came in a few minutes ago.

THE COURT: I take it, ma'am, you've not been here for all my questions then.

JUROR MABREY: (inaudible).

THE COURT: Okay. Let me ask you if you could just sort of stand by for us and if you're needed, why, we'll get to you, if not, maybe then you won't have to serve.

(Voir dire continues)

MS. NEISWINGER: Judge, may we approach the bench. (Unintelligible) Mabrey she was supposed to - she came ahead of Criscinda Elsrod. She's still not coming in.

THE COURT: That's the thing we need to make a bench conference or a bench comment on after we get the jury selected.

MS. NEISWINGER: Well, is she eliminated? Ms. Mabrey?

THE COURT: She was moved to the last – I told her that when she left the courtroom.

MS. NEISWINGER: She was what?

THE COURT: I excused - she was moved to the end of the panel. I've excused everything - everybody from the first eight on, which included her, so - in other words, I indicated to you I was not willing to bring her in and go through everything we had to go through with all the other jurors so that she would be a part of the panel.

Transcript, p. 29, lines 5-26; p. 30,lines 1-13

In addition to immediately removing her from her preassigned position, the transcript establishes that the trial judge made no effort to ascertain why Ms. Mabry was late, or whether circumstances beyond her control prevented her from arriving sooner. Therefore, Petitioner was summarily denied any opportunity to have a juror of his own race, and Ms. Mabry was denied her right to participate in the judicial process on the arbitrary basis that she was not physically present in the courtroom at the appointed time, no explanations or exceptions allowed. Further on this point, it bears mentioning that although Ms. Mabry arrived after the start of general *voir dire*, one of the reasons she missed a portion at least of the trial court's general *voir dire* is that the trial judge ignored her, and the bailiff failed to interrupt the proceedings until after she had sat in the back of the courtroom for an additional period of time after arriving. Therefore, at least part of the cause for any delay that would have been incurred by repeating part of the court's general *voir dire* was the fault of the trial judge and bailiff. The transcript establishes that the trial judge gave no consideration to this fact, and that his major concern was that the white jurors should not be inconvenienced by waiting while he individually questioned Ms. Mabry:

> Ms. Mabrey was not here when we started voir dire examination, was not sworn with the other jurors and a portion, at least, of the Court's voir dire examination had already occurred at the time she entered the courtroom. Then, it was sometime before I was told who she was. I

> saw an individual enter, but I really didn't know who that person was. So when I was asked do we replace juror Steele with juror Elsrod (sic–should read "Mabry"), my response was no. To do that we would have had to stop all proceedings, go back, deal with juror Elsrod (sic–should read "Mabry") individually to get her up to the point where all the other jurors were in order to accomplish that. Since we're dealing with this many people's lives in selecting a jury, I elected not to do that.
>
> Transcript, pp. 30-31.

Petitioner submits that if you insert an adjective listing the race of Ellen Mabry and "all the other jurors" into the foregoing scenario, plus the argument *supra*, the totality of the facts surrounding the elimination of Ellen Mabry as a juror are sufficient to constitute an inference of racial discrimination pursuant to *Batson* principles.

When the inference of discrimination has been established, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson, supra*, 476 U.S., at 97. The prosecutor may not rely upon a claim of his "assumption - or his intuitive judgment" that a black venireperson would be partial to a black defendant on account of race. *Id.* Likewise inadequate is the mere denial by the prosecutor of a discriminatory motive, or the affirmation of his good faith in making individual selections. *Id; Alexander v. Louisiana*, 405 U.S., at 632. "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal

Protection Clause 'would be but a vain and illusory requirement.' *Norris v. Alabama, supra,* at 598." *Batson, supra,* at 476 U.S., p. 98.

The result here "bespeaks discrimination", (*See Hernandez v. Texas*, 347 U.S. at 482), since the trial judge arbitrarily eliminated any chance for Petitioner to have a member of his race serve on the jury on the grounds that it would be inconvenient to make the white venire persons wait while he repeated some of his preliminary *voir dire* questions for one black venire person. Petitioner submits that requiring the remaining venire to wait, sometimes in another room, while one potential juror is questioned is not an unusual occurrence. This can happen, for example, when there are sensitive issues regarding the potential juror, such as being the victim of a sex crime, prior knowledge of one of the parties, attorneys or a key witness, and for a variety of other reasons. As a generality, persons called for jury duty are frequently required to wait, sometimes for hours, for many different reasons, some of which are under the court's control, and some of which are not. For example, venire persons must check in when they appear for jury duty and wait until they are instructed to go to a particular courtroom. Prospective jurors frequently must wait while a list of those appearing for jury duty is compiled and compared with the list of those summoned to appear, so that the order of the actual venire can be ascertained. Waiting also frequently happens while juror questionnaires are filled out, assembled, copied, collated, distributed to and reviewed by attorneys, and when jurors excused from one court are held to see if they are needed in another. Waiting also can occur when an insufficient

number of prospective jurors appear for jury duty and other persons must be immediately summoned to appear. It is also not unusual for prospective jurors to wait while preliminary motions are argued to the court, while parties to the proceeding suddenly get serious about settlement, and for numerous other reasons.

Petitioner submits that the argument that keeping the other jurors waiting while some of the preliminary questions were repeated to Ms. Mabry is an insufficient reason to deny her and Petitioner at least the opportunity for her to be selected as a juror in this case. This is especially true considering that part of the reason she missed at least pt of the court's general *voir dire* was the fault of the trial judge and bailiff.

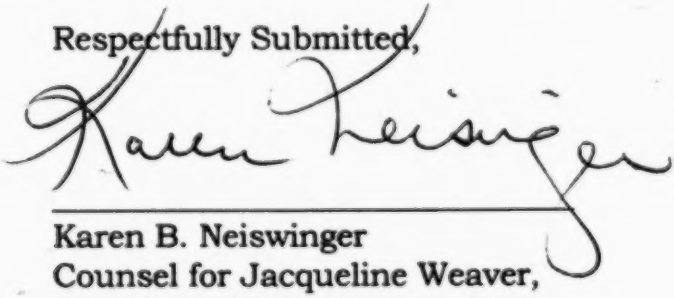
The Indiana Court of Appeals therefore erred when it held that Petitioner failed to meet his burden of demonstrating purposeful discrimination required to violate the Fourteenth Amendment because the trial judge had a "race neutral explanation for placing Mabry at the end of the venire panel". (Memorandum Opinion, p. 10; Appendix, p. 21). This Court has repeatedly found that mere denials of a discriminatory intent and allegations of good faith are insufficient to overcome a prima facie inference of racial discrimination. *Alexander, supra; Norris, supra; Batson, supra.*

Likewise erroneous was the reasoning of the Indiana Court of Appeals that "...a trial judge has control over the proceedings in his court, and his duty is to conduct business expeditiously and consistent

with the orderly procedure and administration of justice. Id at 847. We will review the trial court's decisions regarding the orderly conduct of a trial for an abuse of discretion." (Memorandum Opinion at p. 7; Appendix, p. 18). A trial judge simply does not have the discretion to deny an African American litigant or venire person their rights to equal protection and due process under the rubric of "[m]atters which relate to the orderly conduct of trial [that] are generally within the trial court's discretion." (Memorandum opinion, p. 7; Appendix, pp. 17-18). If such were the law, then the Equal Protection and Due Process rights guaranteed by the Constitution would be meaningless. Virtually any discriminatory or unlawful denial of a black person's rights could arguably be justified under the rationale that the trial judge was merely exercising his discretion to conduct court business "expeditiously" and in an "orderly" fashion.

Petitioner respectfully requests this Court to grant her petition for a writ of certiorari.

Respectfully Submitted,



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